No. 75-1053



# In the Supreme Court of the United States

OCTOBER TERM, 1975

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**JOSEPH W. JONES**, as Director of the County of Riverside, California, Department of Weights and Measures,
*Petitioner,*

vs.

**THE RATH PACKING COMPANY**, a corporation, et al.,
*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## BRIEF FOR THE AMERICAN MEAT INSTITUTE AS AMICUS CURIAE

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## SUBJECT INDEX

# TABLE OF AUTHORITIES

## *Cases*





## *Statutes*



## *Regulations*



## *Rules*

*Miscellaneous*



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### INTEREST OF THE AMICUS CURIAE

Amicus Curiae. The American Meat Institute (the "Institute") is a national trade association of the meat industry. Included in its more than 300 members are meat packers of varying size who process, package and otherwise prepare meat and meat food products at federally-inspected establishments pursuant to the federal Wholesome Meat Act of 1967, 21 U.S.C. §§ 601-695. These meat

products, in turn, are offered for resale throughout the United States, and, thus, may be subject not only to the California net weight labeling requirements being challenged in this case, but to a variety of differing regulations which may be adopted and enforced by other states, if the California regulations at issue are not deemed to be preempted in accordance with the expressed intention of the United States Congress.

Because the decision reached by this Court will not only govern the right of the State of California to regulate net weight labeling of meat products prepared throughout the country, but is also likely to affect similar activity in other states, the entire meat packing industry has a direct interest in the outcome of this litigation. In view of the detrimental impact which state regulation of labeling would have upon meat packers who are not parties to this litigation, the Institute respectfully requests this Court to consider its position as stated herein.

This brief is filed with the written consent of all parties pursuant to Rule 42(2) of this Court.

## SUMMARY OF ARGUMENT

In Section 408 of the Wholesome Meat Act, Congress has unmistakably manifested its intent to preclude state regulation of net weight labeling of meat and meat food products. While Congress has permitted the states to assist in the enforcement of federal net weight labeling standards, it is the federal statute and regulations promulgated thereunder which declare what meat and meat food products are misbranded and thus subject to state enforcement procedures. The state regulations at issue here differ from the federal requirements in that they do not provide for reasonable variation in net weight attributable to loss of moisture content during distribution and do not consider absorption into the wrapper when measuring gross package weight. Under these circumstances, petitioner's regulation of net weight labeling directly contravenes the expressed preemptive intent of Congress, and must be invalidated under the Supremacy Clause of the United States Constitution.



There is little need to resort to legislative history in view of the unambiguous preemptive language of the Wholesome Meat Act. Nonetheless, it is noteworthy that the legislative history of that Act, and associated enactments, overwhelmingly supports the conclusion that Congress intended to preempt state regulation of net weight labeling. Not only does the legislative commentary issued contemporaneously with enactment of the preemptive language of the Wholesome Meat Act dictate this result, but such conclusion is rendered inescapable by the unsuccessful efforts made in 1973 to amend the language at issue after the United States Court of Appeals for the Sixth Circuit had interpreted congressional intent to preclude all state regulation in *Armour* v. *Ball*, 468 F.2d 76 (6th Cir., 1972), *cert. denied*, 411 U.S. 981 (1973).

The congressional intent to promote a uniform national regulatory scheme for net weight labeling of meat and meat food products would be defeated if the states were each permitted to impose individual regulatory standards. Moreover, apart from potential differences in measurement techniques among the states, it must be recognized, as petitioner has failed to do, that there are other factors to be considered when developing fair, uniform requirements for an industry operating on a nationwide basis. Unless deviations in moisture content are taken into account, as required by the Secretary of Agriculture, meat packers would be subjected to unreasonable burdens in-

herent in tailoring the gross weight of each product for different geographical markets depending upon the length of distribution time, relative humidity, average shelf time, consumer buying habits and similar factors.

In view of the unequivocal preemptive language adopted by Congress, the supporting legislative history, and the needs of the meat packing industry for a uniform national regulatory scheme, the judgment of the Court of Appeals invalidating petitioner's efforts to regulate net weight labeling of meat products should be affirmed.



## ARGUMENT

At its core, this case raises a remarkably uncomplicated issue—whether the United States Congress has ordained in Section 408 of the Wholesome Meat Act of 1967, 21 U.S.C. § 678, that the states may not impose net weight labeling standards on meat and meat food products which differ from those set forth in that Act. Reducing that general inquiry to more specific language, the question presented is whether the petitioner, by regulating net weight labeling pursuant to Section 12211 of the California Business and Professions Code and Title 4, Chapter 8(2), Article 5 of the California Administrative Code, in a manner which differs from the regulatory scheme established in Section 1(n)(5) of the Wholesome Meat Act, 21 U.S.C. § 601(n)(5), and in federal regulations promulgated thereunder, 9 C.F.R. § 317.2(h)(2), has violated the intent of Congress to exclusively occupy that field of regulation.

Whether the question is stated in the broad form, or in a more direct fashion, an affirmative answer is dictated by (i) the unequivocal preemptive language adopted by Congress, (ii) the legislative history supporting that language, and (iii) the practical need for uniformity in regulations which underlay the legislative decision to preempt.

### I.

### THE CALIFORNIA REGULATORY SCHEME DIRECTLY CONTRAVENES THE EXPRESS INTENT OF CONGRESS TO PREEMPT STATE REGULATION OF NET WEIGHT LABELING OF MEAT AND MEAT FOOD PRODUCTS.

As this Court has repeatedly recognized, Congress has the power under the Supremacy Clause of the United

States Constitution* to vest a federal agency with exclusive jurisdiction to regulate a field of commerce and to preclude all state activity in that area. To accomplish this end, Congress need only express its clear intent to do so. Federal regulation of a field of commerce will be deemed preemptive of state regulatory power where "Congress has unmistakingly so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963). As this Court stated in *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947):

> "Congress may, if it chooses, take unto itself all regulatory authority . . . share the task with the States, or adopt as federal policy the state scheme of regulation . . . *The question in each case is what the purpose of Congress was.*" (Emphasis supplied.)

Thus, this Court is called upon to determine whether Congress, through enactment of the Wholesome Meat Act, *manifested its intent* to preclude state regulation of net weight labeling of meat products.

Section 408 of the Wholesome Meat Act provides an unmistakable statement of congressional intent by specifically prohibiting the states from imposing any labeling requirements on meat products which are in addition to or which differ from those promulgated under the Act by the United States Department of Agriculture:

> ". . . Marking, *labeling,* packaging, or ingredient *requirements in addition to, or different than, those*

* Article VI, Cl. 2, of the United States Constitution provides in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."



> *made under this Chapter may not be imposed by any State* or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this Chapter. . . ." (Emphasis supplied.)

Additional language in Section 408 corroborates this unequivocal negative command by providing:

> "This chapter shall not preclude any State . . . from making requirement or taking other action, *consistent with this chapter,* with respect to any *other matters* regulated under this chapter." (Emphasis supplied.)

By only permitting state action with respect to "other" matters, and by requiring that such activity be "consistent with" the Act, Congress reaffirmed its intention to preclude all state labeling regulation. The Court of Appeals for the Sixth Circuit, as well as the Court of Appeals for the Ninth Circuit, in this case, have held that Section 408 means what it says. *Armour* v. *Ball,* 468 F.2d 76, 84 (6th Cir., 1972), *cert. denied,* 411 U.S. 981 (1973). There are no contrary decisions.

It is equally clear that the California requirements at issue violate Congress' proscriptive intent. For, as the opinion of the Court of Appeals recognizes (Jones Pet. App., at 28; 530 F.2d at 1314), the California authorities have attempted to regulate net weight labeling in a manner significantly different from that undertaken by the federal government.

In Section 1(n)(5) of the Wholesome Meat Act, Congress has required that all meat and meat food products bear a label showing "an accurate statement of the quantity of the contents in terms of weight", and has provided further that "reasonable variations may be permitted . . . by regulations prescribed by the Secretary." Pursuant

to that statutory direction, the Department of Agriculture has provided in 9 C.F.R. § 317(h)(2) that "reasonable variations caused by loss or gain of moisture during the course of good distribution practices . . . will be recognized." These regulations impact directly on this case, which involves moisture-bearing meat products.

In contrast, the California regulation of net weight, as enforced, requires accurate weight on the average at retail, at the time of weighing, without making any provision for reasonable variations caused by diminution of moisture content during the course of distribution. (Jones Pet. App., at 28; 530 F.2d at 1314.) Precisely because of this conflicting definition of "accurate statement", and *despite full compliance with federal law,* petitioner's inspectors considered the respondent's products to be "misbranded" and ordered them off-sale (App., at 60, 61, 81, 82, 83, 98, 99).

Moreover, apart from California's refusal to allow for reasonable variation in net weight attributable to loss of moisture content by evaporation, the California weighing procedure differs from that adopted by the Department of Agriculture in that the state officials subtract the weight of those portions of the product absorbed into the wrapper from the gross package weight (App., at 95, 102, 103), while the federal officials merely subtract the weight of a dry wrapper (App., at 83, 95).

Thus, the California approach to net weight labeling does differ in significant degree from the federal regulation, and directly contravenes the expressed preemptive intent of Congress. Moreover, as explained in Section III, below, the California requirements exemplify the



practical difficulties created by the imposition of individual state labeling standards.

Petitioner's only response to this unavoidable conclusion is to suggest, in what the Court of Appeals classified as a "strained" argument (Jones Pet. App., at 28. fn. 25: 530 F.2d at 1314), that California is merely exercising its "concurrent jurisdiction" under Section 408 of the Wholesome Meat Act* to prevent distribution of *"misbranded"* food articles and, thus, is not imposing additional or different *"labeling"* requirements, as such (Pet. Br., at 40, 41). This argument, however creative, is totally without substance.

Whatever jurisdiction the states may have to "concurrently" *prevent distribution* of "misbranded" meat food products, it is beyond question that the Secretary of Agriculture, *alone,* and not the states, is authorized to define what products are and what products are not "misbranded". The artificial distinctions drawn by petitioner between "mislabeling" and "misbranding" are not supported by the statute. Rather, the Wholesome Meat Act carefully equates misbranding with mislabeling by providing that a meat product will be considered to be misbranded "if its labeling is false" (21 U.S.C. § 601(n)(1)) or "unless it bears a label showing . . . an accurate statement of the quantity of the contents in terms of weight" (21 U.S.C. § 601(n)(5)).

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* In addition to the preemption language quoted at pp. 6-7, above, Section 408 goes on to provide that,

> ". . . any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded. . . ."

Moreover, the "labeling" requirements, as set forth in the Department of Agriculture's regulations, include not only restrictions as to what will constitute "reasonable variation caused by loss or gain of moisture during the course of good distribution practices", but, also, state in the same section and manner, the type size to be utilized for net weight labeling, the location on the display panel where the net weight information is to appear, the form of language to be used, and similar procedural matters. Absolutely no distinction of the type suggested by petitioner is drawn between the "format" of the label and the "substantive" means of determining its accuracy.

Thus, if a state were permitted at any time to impose its own definition of "misbranding" and to regulate or recall products for violation thereof, the express requirement in Section 408 that states may not regulate "labeling" differently than the United States would be rendered totally nugatory. That is, a state might set any standard it wished, broad or restrictive, with regard to the format of a label, size of type or emphasis, as well as methods of determining net weight, and act to recall the product at will, without concern for the uniform standards adopted by the Department of Agriculture under congressional mandate. That is clearly not what Congress intended when it stated, in unequivocal language, that

> "labeling . . . requirements in addition to, or different than, those made under [the Wholesome Meat Act] may not be imposed by any State. . . ." (Bracketed material supplied.)

Petitioner's contention at p. 40 of its Brief that it is not telling respondents what to say on its label or otherwise imposing any "labeling requirements" is pure sophistry. Certainly there is nothing inherently unlawful in selling packages of bacon, which, by virtue of unavoid-



able moisture loss, weigh less than their original packed weight of 16 ounces. Yet, petitioner is removing those items from retail shelves, if their labels do not reflect that fact. Quite simply, petitioner is *requiring* meat food packers to conform their *labels* to a net weight definition set by the State of California rather than to the exclusive standard established by the United States Department of Agriculture.

Petitioner's reliance on Section 402 of the Act, 21 U.S.C. § 672, is similarly misplaced. That Section does not in any way "indicate an explicit recognition by Congress" of the validity of state laws regulating net weight labeling as petitioner suggests (Pet. Br., at 41). Rather, it merely provides for detention of meat food products by the Secretary of Agriculture when any federal *or* state law, relating to inspection, adulteration, misbranding, or distribution, has been violated. Thus, far from indicating a specific intent to provide for state net weight labeling regulation in direct contravention of the express preemptive language of Section 408, the language would more reasonably be read to apply to state regulation of intrastate operations, concurrent state enforcement of federal misbranding standards, or other authorized areas of state participation in the regulatory process.

In refusing to accept a narrow, literal construction of statutory language that "would produce incongruous results," this Court stated in *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270, 285 (1956):

> "If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' *United States* v. *Boisdore's Heirs,* 8 How. 113, 122."

*Accord, Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957). So here, even if the language in Sections 402 and 408 of the Wholesome Meat Act, when read in "complete isolation", could be interpreted to provide for the imposition of state definitions of "misbranding", that narrow interpretation would produce a result which directly conflicts with the unmistakable preemptive language of Section 408, the definition of "misbranding" in the Act and the overall policy of uniform federal regulation, which, as discussed in Section III, below, underlies the Act.

In order that the federal inspection services may be supplemented and strengthened by the inspection services of the states, concurrent jurisdiction is given to the states to assist in preventing the distribution of "misbranded" food. But it is the federal statute which determines what meat and meat food products are "misbranded", and a state may not rewrite that statute by substituting its own definition of a "misbranded" product for that decreed by Congress.

> "The concurrent action of a State, permitted by this language, only applies to adulterated or *misbranded* articles. *These words are necessarily used as defined in the Act.*" *Armour* v. *Ball, supra,* at 84. (Emphasis supplied.)

There is no rational basis for concluding that Congress, by merely authorizing "consistent" and "concurrent" state jurisdiction to prevent distribution of misbranded articles, intended to permit the states to establish their own inconsistent labeling standards, when in the very same paragraph it unequivocally prohibited imposition of such labeling requirements by those same states.

Finally, it is difficult to understand the relevance of petitioner's detailed discussion of Handbook 67 (Pet. Br., at 19-26). Even if the California regulations at issue were identical to those contained in Handbook 67, and they are not, petitioner's suggestion that the Handbook provides a "federal" standard (Pet. Br., at 19), and thus is somehow entitled to precedence over the standard established by the Secretary of Agriculture under the Wholesome Meat Act, is unsupportable. Handbook 67 is published by the National Bureau of Standards, pursuant to 15 U.S.C. § 272, which merely authorizes the Secretary of Commerce to *cooperate* with the states in securing uniformity in weights and measures laws and methods of inspection, and to *compile* and *publish* general technical data in connection with that function. As petitioner appears to recognize at pp. 20-21 of its brief, the Handbook does not exceed this limited authority. That is, the Handbook is merely a suggestive technical guidebook for states to follow or ignore as they deem appropriate. It is not in any sense mandatory, has no federal statutory effect, and certainly does not purport to override or interfere with the Secretary of Agriculture's specific authority created by the preemptive language of the Wholesome Meat Act.

The Wholesome Meat Act provides for exclusive regulation of net weight labeling of meat and meat food products, and *any* state requirements "in addition to or different than" those imposed by the Secretary of Agriculture are specifically prohibited. Since the state regulations at issue fall within that proscription, it is of no consequence whether those regulations bear similarity to the guidelines proposed in Handbook 67.

## II.

## THE INTENT OF CONGRESS TO PREEMPT STATE REGULATION OF NET WEIGHT LABELING AS EXPRESSED IN THE WHOLESALE MEAT ACT IS SUPPORTED BY THE LEGISLATIVE HISTORY OF THAT STATUTE.

While this Court has repeatedly recognized that the literal language of a statute provides the foremost guide to its interpretation, and that there is little need to resort to legislative history where the provisions of the statute are clear and unequivocal on their face, *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *United States* v. *Shreveport Grain & Elevator Co.,* 287 U.S. 77, 83 (1932), it is nevertheless significant that the legislative history of the Wholesome Meat Act and associated enactments fully supports the conclusion that Congress intended to preempt state regulation of net weight labeling. *Cass* v. *United States,* 417 U.S. 72, 77-79 (1974); *Train* v. *Colorado Public Interest Group, Inc.,* 44 U.S.L.W. 4717, 4719 (U.S., June 1, 1976).

To begin, the historical record is replete with statements which do little more than paraphrase the proposed statutory language, but which nonetheless reflect the unmistakable intent of Congress, as expressed in Section 408, to preclude state activity.

For example, when the House Subcommittee submitted H.R. 12144, containing Section 408, to the Committee on Agriculture, the principal provisions of Subchapter IV were summarized in relevant part as follows:

> "Provide for separation of authority between State and Federal Governments regarding the inspection of meat and meat products. States would be prohibited from regulating federally inspected plants whose operations are governed by title I. Any recordkeeping and related requirements proposed by States for federally inspected plants must be in conformance with the Federal Meat Inspection Act. *States could not impose marking, labeling, packaging, or ingredient requirements in addition to or different from Federal requirements for products prepared under Federal inspection.*" (Emphasis supplied.) H.R. Rep. No. 653, 90th Cong., 1st Sess. at 7 (1967).



And, when the Subcommittee of the Senate Committee on Agriculture and Forestry conducted Hearings in November of 1967 with respect to the proposed legislation, it analyzed the preemptive language of Section 408 in the following manner:

> "*Section 408 would exclude States* . . . from regulating operations at plants inspected under title I or *from imposing* marking, *labeling,* packaging, or ingredient *requirements in addition to or different than those under the Federal Meat Inspection Act* for articles prepared under inspection in accordance with title I of the Act, but would permit them to impose recordkeeping and related requirements with respect to such plants if consistent with the Federal requirements. . . ." (Emphasis supplied.) *Hearings on S. 2147, S. 2218 and H.R. 12144 Before a Subcom. of the Senate Comm. on Agriculture and Forestry,* 90th Cong., 1st Sess. at 50 (1967).

Later in those Hearings, an explanation of the preemptory language was provided by the Deputy Assistant Secretary of Agriculture:

> "States would be precluded from imposing additional or different labeling or packaging requirements for federally inspected products." *Id.* at 63.

And, just before enactment by the Senate on November 28, 1967, Senator Dirksen supplied his understanding of the section in issue:

> "States would be prohibited from imposing on federally inspected establishments requirements with respect to premises, facilities, operations, labeling, pack-

aging, and ingredients that were in addition to or different from those of the U. S. Department of Agriculture." 113 Cong. Rec. 33987 (1967). (Remarks of Senator Dirksen.)

See also Senate Report No. 799, providing that:

> "Section 408 would exclude States, territories, and the District of Columbia from . . . imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with title I of the act, but would permit them to impose recordkeeping and related requirements with respect to such plants if consistent with the Federal requirements and to impose requirements consistent with the Federal provisions as to other matters regulated under the act." *U. S. Code Congressional and Administrative News,* 90th Cong., 1st Sess., vol. 2, p. 2207 (1967).

Perhaps the most directly relevant statement was provided by the Association of Food and Drug Officials of the United States which was strongly opposed to the adoption of Section 408. While the Association was very critical of Department of Agriculture regulation, it recognized the unmistakable effect of the proposed legislation:

> *"Section 408 . . . continues to strip the states of their traditional authority to protect their citizens by preempting the area of labeling,* packaging, of ingredients requirements. *The conditions which constitute misbranding* and adulteration *as defined in this bill* for the first time in a federal meat inspection bill are almost identical with those which are part of the food laws of nearly every state. These food laws have been enforced by the states in their older forms or the present forms for sixty years. Their terms apply to meats as well as to other foods. * * * *These would be voided by the passage of this section of HR 6168."* (Emphasis supplied.) *Hearings on H.R. 1314, H.R. 1321 and H.R. 6168 Before the Subcom. on Livestock and Grains of the House Comm. on Agriculture,* 90th Cong., 1st Sess., at 189, 191 (1967).

Equally conclusive indications of an intent to preclude state labeling regulation can be derived from congressional activity which followed judicial consideration of the preemptive language.

For example, in 1973, after the United States Court of Appeals for the Sixth Circuit had held in *Armour* v. *Ball, supra,* that Congress had intended to preclude all state regulation, and this Court had denied certiorari, a bill was introduced in Congress to amend Section 408 of the Wholesome Meat Act by striking the phrase "in addition to, or different" from the clause under consideration here, and inserting the phrase "less strict" in lieu thereof. H.R. 1752, 93d Cong., 1st Sess. (1973). This proposed amendment, which was intended to change the existing law so as to authorize states to impose labeling requirements stricter than those issued by the Department of Agriculture, never reached the floor of Congress. As this Court recently concluded in *Runyon* v. *McCrary,* 44 U.S. L.W. 5034, 5038 (U.S., June 25, 1976), there "could hardly be a clearer indication of congressional agreement" with a court's interpretation of a statute than legislative rejection of an amendment specifically designed to overcome that decision.

Apart from the obvious import of the congressional rejection of H.R. 1752, a number of specific statements made during the course of Hearings on that amendment, which further clarify the original preemptive intent of Congress, are worthy of note.

First, the official position of the Department of Agriculture is set forth in a letter dated July 16, 1973, to Hon. W. R. Poage, Chairman of the House Committee on Agriculture. In that letter, the Department stated its opposition to enactment of the amendment, recognized that the bill would serve to change existing law which provided for

uniform national standards and procedures, and set forth the problems which enactment would engender:

> "The bill's proposed amendment to section 408 of the Federal Meat Inspection Act would cause administrative and consumer-related problems far outweighing any benefits which might be gained. It would, by implication, permit each State to establish its own more strict requirements for marketing, labeling, packaging and ingredients. As a result, federally inspected meat products could be barred from sale by jurisdictions with more stringent standards, thereby hampering the free flow of such products in interstate commerce. In addition, there could be a dual Federal-State system of regulation of federally inspected establishments with the State requirements prevailing over Federal provisions.
>
> • • •
>
> "If this bill were enacted, consumers could be denied the wide choice of products now available. Industry would be burdened with the task of producing labeling and packing its meat products in many different ways in order to comply with the diverse requirements of jurisdictions where the establishments are located or into which products are shipped. The result would well be chaos in this nation's food marketing system. Ultimately the cost would be passed on to the American consumer, thus contributing to higher food costs." *Hearings on H.R. 1752 Before the Subcom. on Livestock and Grains of the House Comm. on Agriculture,* 93d Cong., 1st Sess. at 1, 2 (1973).

Later in the Hearings, Mr. Clayton Yeutter, Assistant Secretary of Agriculture, was even more specific in an exchange with Congressman Sisk:

> "Mr. Sisk. As I understand, Mr. Secretary, the position taken by the Department in connection with the pending lawsuit and others is that when Congress passed the Federal meat inspection law, that in fact preempted State law for purposes of interstate commerce.



> "Mr. Yeutter. Yes, sir.
>
> "Mr. Sisk. I appreciate the comments of the gentleman. I think basically the Department is right in that matter. I don't think it was any question but the intent of the Congress to preempt the right of the States. We have done this in many, many other areas in which there is total preemption and this is what Congress did in this case." *Id.* at 12, 13.

The full statement of Mr. Yeutter provides further clarification:

> "The bill's proposed amendment to section 408 of the Federal Meat Inspection Act would in effect permit the establishment of fifty different sets of State-imposed standards for federally inspected meat food products. We believe such a result would contradict the original intent of Congress in enacting the Federal Meat Inspection Act, would seriously impede the flow of meat food products in interstate commerce, and would bring about higher food prices for consumers.
>
> • • •
>
> "The proposed amendment to section 408 would negate the expressed intent of Congress that inconsistencies be avoided and uniformity be promoted." *Id.* at 20.

As this Court has recognized, statutory interpretations by an affected agency are entitled to much weight, particularly when that agency participated in the enactment of the subject legislation. *Zuber* v. *Allen,* 396 U.S. 168, 192 (1969); *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148, 164 (1942); *Mintz* v. *Baldwin,* 289 U.S. 346, 351 (1933).

While officials of the State of Michigan, whose regulations were invalidated in the *Armour* v. *Ball* litigation, and sponsoring congressmen from Michigan, indicated their belief during the Hearings that Congress did not intend to preempt state regulation, all objective commentators appear to have concluded that Congress intended precisely what it stated, that "labeling . . . require-

ments in addition to, or different than, those made under [the Wholesome Meat Act] may not be imposed by any State. . . ."

It is interesting to note, as well, that the decision of the United States District Court *in this case* also prompted a Member of Congress from California to support the proposed amendment to Section 408, during the Hearings, and at the same time to recognize the preemptive impact of the existing statutory language:

> "As I am sure the Subcommittee is aware, recent court decisions have put California's law regarding weights and measures in jeopardy. The County of Los Angeles brought suit against a meat packing company because their packages of meat were consistently found to be short weight at the time of sale. However, the Federal court decided that the state could not apply its stricter laws to meat products which were federally inspected, because this would preempt the Federal laws governing products sold in interstate commerce.
>
> "*Under present law this decision was appropriate.* I feel, however, that the State of California should have the right to provide California consumers with greater protection in the market place, as the California State Legislature decides." (Emphasis supplied.) *Hearings on H.R. 1752 Before the Subcom. on Livestock and Grains of the House Comm. on Agriculture,* 93d Cong., 1st Sess. at 120, 121 (1973). (Remarks of Rep. Edwards.)

Finally, special note should be taken of the impact of the judicial decisions in *Swift & Co.* v. *Wickham,* 230 F. Supp. 398 (S.D.N.Y., 1964), *aff'd,* 364 F.2d 241 (2d Cir., 1966), *cert. denied,* 385 U.S. 1036 (1967), and the apparent congressional response to them. In that case, the District Court, finding no unambiguous congressional mandate that the Poultry Products Inspection Act, 21 U.S.C. § 451, *et seq.,* was intended to exclude state regulation of net weight labeling for frozen turkeys, held against preemption. 230 F. Supp. at 406. The Court of Appeals then affirmed, agreeing that Congress had not "unmistakably ordained" that the federal Act was intended to oust the states from regulatory jurisdiction. 364 F.2d at 244. Significantly, in the following year, Congress *amended* the Poultry Products Inspection Act by adding preemptive language identical to that appearing in Section 408 of the Federal Wholesome Meat Act:



> ". . . Marking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any official establishment in accordance with the requirements under this chapter, but any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary . . . for the purpose of preventing the distribution of any such articles which are . . . misbranded."
> 21 U.S.C. § 467e (1968).

The importance of this sequence of events is underlined by the testimony of Dr. Robert K. Somers, Deputy Administrator of the Consumer and Marketing Service of the Department of Agriculture, to the effect that the specific language utilized in Section 408 of the Wholesome Meat Act was designed to evidence a congressional intent to provide federal authority for the establishment of standard marking, labeling, packaging and ingredient requirements. In reaching this conclusion, Dr. Somers significantly indicated that specific language was necessary because ambiguous language of the Poultry Act had recently caused litigation to be pursued all the way to the United States Supreme Court. *Hearings on H.R. 1314, H.R. 1321, and H.R. 6168 Before the Subcomm. on Livestock and Grains of the House Committee on Agriculture,* 90th Cong., 1st Sess., at 25, 26 (1967).

Petitioner has relied upon the decision in the *Swift* litigation to support the general proposition that the regu-

lation of weights and measures is "one of the oldest exercises of governmental regulatory power." (Jones Pet., at 25.) It is submitted that closer analysis of that case and its congressional aftermath provides a far more significant subject for this Court's consideration.

## III.

## THE INTENT OF CONGRESS TO PROMOTE A UNIFORM NATIONAL REGULATORY SCHEME FOR NET WEIGHT LABELING OF MEAT AND MEAT FOOD PRODUCTS WOULD BE DEFEATED IF THE STATES WERE PERMITTED TO IMPOSE DIFFERING REQUIREMENTS.

The Court of Appeals has stated, and petitioner recognizes, that the intent of Congress, when enacting Section 408 of the Wholesome Meat Act, was to create a uniform national labeling system. Petitioner argues, however, that to permit reasonable variations caused by loss or gain of moisture during the course of good distribution practice would negate that intent. (Pet. Br. at 18.) It is respectfully submitted that petitioner's arguments are misdirected and erroneous.

First, it is not the province of the State of California or petitioner to determine how the intent of Congress is to be effectuated. There may be honest dispute as to what measurement techniques are the most preferable. But, if the State of California, or any other governmental authority, believes that the Department of Agriculture regulations providing for reasonable variation are not adequate, their recourse is to that Department or to Congress. They cannot, by independent action, superimpose their own beliefs as to how net weight labeling should be regulated. Congress, in the exercise of appropriate constitutional authority, has expressed its intent to preclude state regulation in the interest of uniformity, and that expression represents the supreme law of the land.



Second, the regulatory procedures which petitioner would substitute for those mandated by Congress would in no way ensure the "uniformity" in labeling which petitioner concedes to be desirable.

Petitioner assumes, without justification, that all states would adopt California measurement techniques, rather than those applied by the Department of Agriculture, or other as yet unidentified standards—an assumption that must be made to support petitioner's conclusions. But how can petitioner ensure that the states which have expressed interest in this litigation by filing *amicus curiae* briefs, or, indeed, those states which have not supported petitioner's cause, would conform their regulation and enforcement procedures to that adopted by California? Would some states provide for reasonable diminution of moisture content during distribution while others totally ignore evaporation loss? Would some states deduct a dry wrapper when computing net weight while others subtract the portion of the meat product absorbed into the wrapper as well? No one can provide answers to these questions. But the very uncertainties engendered by them refute petitioner's simplistic effort to prove that regulation of net weight labeling by the states would result in national uniformity.

Moreover, apart from potential differences in measurement techniques among the states, it must be recognized, as Congress has directed, that there are other factors to be considered when developing fair, uniform requirements for an industry operating on a *nationwide* basis. For example, the federal standard, unlike that applied by California, takes into account deviations in moisture content which are a direct function of distribution time. As the uncontroverted testimony in this case indicated, one pound of bacon will lose approximately 1/16th of an ounce of

moisture by evaporation between the time it is packaged and weighed and the time it is placed in the distribution stream (App., at 90, 91, 94). Thereafter, while nutritional value is not affected, that same bacon will continue to lose .3 to .4 sixteenths of an ounce of moisture per day until it is sold at retail (App., at 94, 95). When it is further recognized that the wrapper (which is deducted from gross weight under California measurement techniques) will absorb significant portions of the product during distribution, it is apparent, under petitioner's approach, that a national meat packer would have to carefully tailor the gross weight of each of his products for different markets depending upon the proximity of the ultimate retail outlet and the efficiency of transportation facilities. Thus, a package of meat products that meets petitioner's so-called "accurate" standard in Omaha, Nebraska, may well prove underweight when measured by the identical standard in Riverside County, California. Unless reasonable deviations are permitted, as the Department of Agriculture has recognized, the respondent would be subjected to an unreasonable burden, and the consumer would be required to bear the costs associated with that burden. (See statements of the Department of Agriculture, quoted at pp. 17-19, *supra.*)

In addition, there are other problems potentially affecting the nationwide meat packing industry which petitioner fails to consider. Differences in the relative humidity between given geographical areas are likely to affect the rate of evaporation and resultant weight loss. Also, the average shelf time may vary from area to area and store to store depending upon consumer buying habits, retail selling policies, seasonal food preferences, economic conditions and similar factors. It is just these types of factors which the federal standard, providing for reasonable



variations, takes into account. And, it is the same type of reasonable deviations, and the difficulties in conforming with them, which the California standard, however accurate, would ignore.

Finally, a decision permitting individual states to impose differing labeling requirements would not only have an adverse impact on the meat packing industry, but would dramatically alter the regulatory responsibilities of the Department of Agriculture, as well. Since packers would be required to meet a variety of state net weight standards, federal inspectors would be obligated to supervise packing operations so as to ensure that each product conforms with the relevant state standard and is not misbranded. Similarly, under Section 7 of the Wholesome Meat Act, 21 U.S.C. § 607, Department of Agriculture officials would be obligated to review and approve, in advance of their use, all labels required for all products by all states electing to regulate. In essence, the federal government would be expending its major efforts administering a wide variety of state requirements rather than enforcing its own uniform and pervasive regulatory scheme.

As the Assistant Secretary of Agriculture testified in the 1973 Congressional Hearings relating to the proposed amendment to remove the preemptive language of Section 408,

> "Just looking at labels alone and ignoring all the other six areas, we processed 181,000 labels this last fiscal year at a cost of something over $400,000, an average of a little better than $2 per label. If the Interstate meatpacking firms had to process label changes every time a State changed its label regulations, this 181,000 would end up being many, many hundreds of thousands, depending on the number of States that had regulations that were different from

the Federal. Of course, it would have an obvious impact on our processing of all those label changes as well as on providing surveillance over any changes in premises, equipment, and so on.

"The cost to the Federal meat inspection program is inestimable, but it is bound to be a very significant factor, and we think it is totally unjustified. It obviously serves as a trade barrier too." *Hearings on H.R. 1752 Before the Subcomm. on Livestock and Grains of the House Comm. on Agriculture,* 93d Cong., 1st Sess. at 10, 11 (1973).

Recognizing the practical difficulties which a patch-work quilt of state regulations would create, and focusing as well on the intolerable burdens associated with meeting an absolute weight standard in different geographical areas, Congress has exercised its constitutional right to preempt state regulation of net weight labeling. However dissatisfied petitioner may be with that exercise of legislative authority, it must, under the Constitution of the United States, bow before it.

## CONCLUSION

To date, the preemption language of the Wholesome Meat Act of 1967 has been placed directly at issue in three cases. The Appellate Division of the New York Supreme Court invalidated New York City's meat labeling requirements while concluding that Section 408 of the Wholesome Meat Act "has explicitly ordained that the Secretary of Agriculture has exclusive jurisdiction of the labeling requirements of meat products produced in federally inspected meat packing plants." *Meat Trade Institute, Inc.* v. *McLaughlin,* 326 N.Y.S.2d 683, 37 A.D.2d 456 (1971).

The United States Court of Appeals for the Sixth Circuit has declared that "in view of its unambiguous language, Section 408 reflects unequivocal legislative purpose



to make the Federal [Wholesome Meat] Act preemptive." *Armour* v. *Ball, supra,* at 84-85. And, the United States Court of Appeals for the Ninth Circuit has concluded in this action, "from the clear language and legislative history of" Section 408, that "Congress has unmistakingly . . . ordained" its intent to preempt state regulatory power with regard to net weight labeling (Jones Pet. App., at 26; 530 F.2d at 1313).

For the reasons set forth in those opinions, and reiterated herein, the American Meat Institute, on behalf of its members, respectfully requests this Court to affirm the judgment of the Court of Appeals invalidating petitioner's efforts to regulate net weight labeling of meat products.

Respectfully submitted,

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